

SOUTH AFRICA / JUDGMENT

Thumos properties (Pty) Ltd and Others v Sharemax Zambezi Retail Investments (Pty) Ltd (Formerly known as Brookfield Investments 256 (Pty) Ltd and Another (18384/2014) [2020] ZAGPPHC 8 (10 January 2020) [2020] ZAGPPHC 8

COURT
North Gauteng High Court, Pretoria

BEFORE
Raulinga

CASE / FILE NUMBER
18384/2014

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
(1)

REPORTABLE: YES/NO
(2)
OF
INTEREST TO OTHER JUDGES: YES/NO
(3)
REVISED
CASE
NO: 18384/2014
10/1/2020
In

the matter between:

THUMOS
PROPERTIES (PTY) LTD
(FORMERLY
KNOWN AS CAPICOL (PTY) LTD)
First Plaintiff
CAPICOL
REM (PTY)
LTD
Second Plaintiff
FINE ASSET INVESTMENT 119 (PTY) LTD
Third Plaintiff
And
SHAREMAXZAMBEZI
RETAIL PARK
INVESTMENTS(PTY)LTD
(FORMERLY
KNOWN AS BROOKFIELD
INVESTMENTS
256 (PTY)
LTD
First Defendant
SHAREMAX
ZAMBEZI RETAIL PARK HOLDINGS LTD
Second
Defendant

JUDGMENT

RAULINGA J,

- [1] On or about 5 March 2014, the plaintiffs issued summons against the defendants. The plaintiffs' particulars of claim comprise five claims advanced by the plaintiffs.
- [2] The plaintiffs' claims are based upon conclusion of a series of agreements and the consequences flowing from the alleged non-fulfilment of certain suspensive conditions contained in a number of those agreements.
- [3] The agreement which forms the subject matter of the present hearing, is a Sale of Business Amendment Agreement ("SOSA") concluded on 5 July 2011. This SOSA was purportedly approved or ratified by the members of the Board on 6 July 2011.
- [4] A further agreement which was extensively referred to in evidence was the prior iteration of the SOSA concluded on 18 June 2011, subsequent to the settlement agreement but prior to SOBA and which was overtaken and superseded by the SOBA. For ease of reference this agreement will hereafter be referred to as "the additional agreement."

[5] It is important to note that the plaintiffs contend that the Sale of Business Amendment Agreement entered into on 18 June 2011 is not the SOSA upon which this Court is required to adjudicate in this trial. However, the plaintiffs in their papers repeatedly refer to this SOBA. It is indeed the SOBA entered into by the first plaintiff, second plaintiff, the third plaintiff, the first defendant and the second defendant on 5 July 2011 which contains the suspensive conditions which forms the subject of the present hearing.

[6] Having said that, it is also prudent to recognise that on 20 June 2011 a meeting was held of the common directors of the five companies including the first defendant and second defendant. The evidence of Mr Myburgh who testified on behalf of the defendants was that the Sale of Business Amendment Agreement dated 18 June 2011 was circulated to the directors and thoroughly worked through and discussed at this meeting. A resolution was passed at the meeting in relation to this agreement which was recorded in the signed and approved minute of the meeting as follows:

"4.1 Daar word besluit om die aanvu/lende vooreenkoms met Capitol en Zambezi Retail Park wat deur me D Haese namens die direksie onderleken is, te bekragtig en ook haar aan te wys as die gemagtigde persoon om die aanvullende ooreenkoms te onderleken."

(in English: "It is decided to ratify the supplementary additional agreement with Capitol in respect of Zambezi Retail Park which was signed by Ms D Haese on behalf of the Board of Directors and also to designate her as the authorised person to sign the supplementary additional agreement.")

[7] It is common cause that due to the non-fulfilment of one of the other suspensive conditions, this Sale of Business Amendment Agreement

signed on 18 June 2011 lapsed and became of no force and effect by the end of June 2011. Although this agreement is not the subject for determination, however, for the purpose of interpretation, it might be advisable to look at this resolution and others which may be relevant to the issue at hand.

[8] The suspensive conditions contained in clause 14 of the SOSA read as follows:

"14 Suspensive Conditions

14.1 This agreement is subject to the fulfilment of all the following suspensive conditions:

14.1.1 The approval being obtained from the board of directors of Zambezi Holdings and Zambezi Retail approving the entering into of this agreement and the cancelation of the settlement agreement, together with all the addendums thereto as per the provisions of this agreement, and the settlement of the claims and the disputes between the parties as provided for in clause 5 above, by no later than 17h00 on Wednesday 6 July 2011."

[9] At the commencement of the trial the Court made an order at the request and by agreement between the parties, to separate certain issues for initial determination by the Court in terms of Rule 33(4). The order granted by the Court is as follows:

"1 The following issues be separated for determination by the Court, in terms of Rule 33(4) of the Uniform Rules of Court, and that the remaining issues be postpone for determination at a later date.

2 The issues to be separated and determined are those arising from the following paragraphs of the plaintiffs' particulars of claim in the consolidated actions and the defendants' plea and counterclaim:

2.1 The introductory part of paragraph 17 together with paragraph 17.1 of the particulars of claim, read with paragraphs 16.1 and 16.2 (including paragraphs 16.2.1 and 16.2.2) of the defendants' plea; and

2.2 Paragraph 15A of the first defendant's claim in reconvention read with paragraph 8.4 of the plaintiffs' plea in respect thereof."

[10] If the separated issue is decided in the defendants' favour and it is held that the suspensive condition contained in clause 14 of the SOBA was fulfilled, then the plaintiffs' claim fall to be dismissed and the defendants' counterclaim will stand over for adjudication on a future date. A finding on this issue in favour of the plaintiffs, however, will not be dispositive of either if the parties' claims and the balance of the issues will stand over for a determination on a future date.

[11] In paragraph 17 read with paragraph 17.1 of the plaintiffs' particulars of claim it was alleged that the suspensive conditions contained in clause 14 of the SOBA dated 5 July 2011 were not fulfilled, which allegations were denied by the defendants, who contended that the suspensive conditions had been properly and timeously fulfilled. In paragraph 15A of the defendants' claim in reconvention it was alleged that the suspensive condition stipulated in clause 14 of the SOBA dated 5 July 2011 was timeously fulfilled and that the agreement remains of full force and effect, which allegations were denied by the plaintiffs.

[12] In paragraphs 12 and 13 of the minute of the pre-trial conference held on 15 October 2018 it was recorded that the parties were in agreement that the plaintiffs bear the onus of proof insofar as they rely on non-fulfilment of the suspensive conditions, that the defendants bear the onus of proof insofar as they rely on the fulfilment of the conditions, that the plaintiffs had the duty to begin, and that both parties commit themselves to lead evidence on the separated issues.

[13] Accordingly, the issue which this Court is required to determine is whether or not the suspensive conditions as stipulated in clause 14 of the SOSA dated 5 July 2011 were fulfilled. In this regard Mr Kyriacou testified on behalf of the plaintiffs, and Mr Myburgh testified on behalf of the defendants. At the relevant time in July 2011 Mr Kyriacou was a director of all

plaintiffs' companies, whereas Mr Myburgh was a practising attorney and consultant to the defendants' companies. He has recently earlier in 2018 been appointed as director of the defendants' companies. The directors of the defendants' companies at the relevant time in 2011 were W.J. Hartzenberg, R.P Badenhorst, D. Haese, D.R. Koekemoer and Roodt. None of these directors was called to testify.

- [14] It is instructive to note that the plaintiff's view the suspensive conditions as three separate suspensive conditions. On the other hand, the defendants view this as one suspensive condition with component parts. The defendants submit that this distinction is, however, of no moment because, whether it is viewed as one suspensive condition or separate suspensive conditions, the result is the same. The plaintiffs contend that the suspensive condition (or each of its component parts) was not fulfilled, and the defendants contend that the suspensive condition (or each of its component parts) was fulfilled.
- [15] For one to contrast the distinction between the approach taken by the plaintiffs and the one taken by the defendants, guidance can be found in Clause 5 of the SOBA dated 4 July 2011 which provides that the first plaintiff and the third plaintiff and the first defendant agree and confirm that "subject to the fulfilment of all the suspensive conditions in clause 14" the Buy Back Agreement is cancelled and that the first and third plaintiff and the other parties will have no claims against one another arising from the cancellation or prior existence of that agreement, further, Clause 5 of the SOBA dated 5 July 2011 provides that all disputes which have arisen and exist, and all claims which the parties have against each other arising from the previous agreements entered into between them, are finally and fully settled, "subject to the fulfilment of all the suspensive conditions in Clause 14 infra."
- [16] In this regard I refer to the suspensive conditions in Clause 14 as regurgitated in paragraph 8 of this judgment. This therefore serves to confirm the view contended by the plaintiffs that there are three separate suspensive conditions, each of which had to be fulfilled before the meeting of the Boards of Directors of the companies concerned held on 6 July 2011.
- [17] The defendants argue that the plaintiffs do not rely on any direct evidence of what transpired at the meeting as Kyriacou was not present. That the plaintiffs rely entirely on circumstantial evidence and require the Court to find in their favour by drawing inferences. By contrast, the defendants are of the opinion that they rely on direct evidence in the form of first-hand knowledge

and observations of what transpired at the meeting through Myburgh who was in attendance and stated that he specifically recalls the events which transpired.

- [18] This argument may be dismissed on the basis that, as a matter of law, evidence is not admitted merely because it was tendered directly. Evidence is admitted on the basis of its veracity after a proper evaluation of the facts before the Court. In the first place, it is significant that Myburgh testified that it was his view that there had been an omission of words from the suspensive conditions contained in Clause 14.1.3 of the agreement dated 18 June 2011, and that the words "approving the entering into of the agreement" should also

have appeared there, as it appeared in the subsequent SOBA signed on 5 July 2011.

- [19] As he was not a signatory or party to the agreement signed on 18 June 2011, Myburgh's view as to what should or should not have been contained in Clause 14.1.3 or as to what the parties might have contemplated or intended is irrelevant and inadmissible in evidence. I therefore agree with the plaintiffs that he being the person who claims to have informed the Board of Directors of the terms of the agreement at both the meetings on 20 June 2011 and on 6 July 2011, believed that in order for the suspensive condition to be fulfilled no more was required of the Board of Directors than to approve the entering into of the agreement. His proffered view and belief was that the remainder of the suspensive conditions (both in the agreement dated 18 June 2011 and in the agreement dated 5 July 2011) was superfluous in that, if the Board of Directors approved the entering into of the agreement, they would in his view of necessity and by implication also have approved the cancellation of the Settlement Agreement in terms of Clause 2 as well as the settlement of claims and disputes in terms of Clause 5.
- [20] This means that he gave the Board the impression that all they were required to do was to approve the entering into of the agreement, in other words, to ratify the conclusion of the agreement and no more. Secondly, Myburgh conceded under cross-examination that the English version of the resolution passed on 6 July 2011 on a proper interpretation thereof does not constitute fulfilment of the suspensive conditions stipulated in Clause 14. Regarding the Afrikaans version of the resolution as contained in the minute of 6 July 2011, interpreted in the context of what is recorded in the minute, Myburgh conceded that if the words "Zambezi Retail Park" which appear in paragraph 5.3.1 of the minute of 6 July 2011 are a reference to Sharemax Zambezi Retail Park Investments (Pty) Ltd, the meaning and wording of the Afrikaans version of the resolution and that the English version of the resolution are the same. It would inevitably follow that the suspensive conditions were not fulfilled.
- [21] The evidence of Myburgh must be evaluated and weighed against the evidence of Kyriacou who confirmed in his testimony that he had in an earlier affidavit stated the following:
- "Neither of the Sharemax respondents informed any of the applicants prior to or subsequent to 17h00 on Wednesday 6 July 2011 that the suspensive conditions as stipulated in Clause 14 of the agreement had been fulfilled. The applicants, through their attorneys Bent Smith Incorporated, addressed several written demands to the Sharemax respondents to furnish proof of fulfilment of suspensive conditions, but despite such demands the Sharemax respondents failed to furnish proof that the Board of Directors of the two respondents had given the approvals as contemplated in Clause 14 and that the suspensive conditions had been timeously/y fulfilled."
- [22] Kyriacou also testified under cross-examination that he had called Ms Haese several times after 6 July 2011 and before he received her letter dated 12 July 2011. In regard to this version, it was put to Kyriacou in cross-examination that Myburgh and Ms Haese would testify that Ms Haese telephoned Kyriacou on 6 July 2011 to say that the agreement had been

approved. As the plaintiffs correctly submit, this was not put, nor was it testified by Myburgh that Kyriacou had been told that the suspensive conditions had been fulfilled or that the Board of Directors of both companies had given the approach as required and contemplated in Clause 14.

[23] It has been stated by our Courts, that if a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct.[1]

[24] In my view, both Kyriacou and Myburgh gave direct evidence. The difference is that Myburgh attended the meeting of 6 July 2011,

whereas Kyriacou did not. Kyriacou as a Director of one or the other company of the plaintiff had the knowledge of what transpired.

Therefore, the plaintiffs and the defendants tendered both direct and circumstantial evidence. However, the defendants failed to prove that the suspensive conditions were fulfilled, in that the evidence is not convincing. The plaintiff's evidence is further plagued by their failure to call retired Judge Hartzenburg and Ms Haese to testify on their behalf. Moreover, Judge Hartzenburg is the author of the Afrikaans version of minute of the Board of Directors resolution.

[25] Section 73 of the Companies Act[2], deals with meetings of the Board of Directors of a company. Sections 75(6)- (8) provide as follows:

"75(6) A company must keep minutes of the meetings of the board, and any of its committees, and include in the minutes -

- (a) A declaration given by notice or made by a director as required by section 75; and
 - (b) Every resolution adopted by the board
- (7) Resolutions adopted by the board -
- (a) must be dated and sequentially numbered, and
 - (b) are effective as of date of resolution, unless the resolution states otherwise;
- (8) Any minutes of a meeting, or a resolution, signed by the chair of meeting, or by the chair of the next meeting of the board, is evidence of the proceedings of the meetings, or adoption of that resolution, as the case may be."

[26] As the plaintiffs correctly submit, the minutes of the meeting of the Board held on 6 July 2011 were signed and approved by the chair, retired Judge Hartzenberg, and were also confirmed by the Board at the subsequent meeting. The minutes of the meeting of 6 July 2011 and resolutions recorded in those minutes, are accordingly evidence of the proceedings of that meeting and the adoption of those resolutions. Having produced and tendered the minutes to the Court, the defendants are bound by the contents thereof.

[27] The English version of the resolution of the Board of Directors of Sharemax Zambezi Retail Park Investments (Pty) Ltd passed on 6 July 2011 is signed not only by the chair of the meeting held on 6 July 2011, but also by the other three directors who were present at the meeting. Accordingly, in terms of section 73(8) of the Companies Act, that document is evidence of the adoption of a resolution by the Board of Directors of Sharemax Zambezi Retail Park Investments (Pty) Ltd that "the Board herewith ratifies the Sale of Business Amendment Agreement between Capicol (Pty) Ltd and Sharemax Zambezi Retail Park Investments (Pty) Ltd as signed on 5 July 2011. As a matter of fact, Myburgh under cross-examination confirmed that the English wording of this resolution is a correct translation of, and has the same meaning as the Afrikaans wording of the resolution as contained in the signed and approved minutes of the meeting held on 6 July 2011.

[28] I have considered the steps followed in the process of drafting the suspensive conditions, in the SOBA signed on 5 July 2011 and

including the subsequent meeting of the Board of Directors on 6 July

2011. As stated above in this judgment, for a proper interpretation

of the suspensive conditions this includes the SOBA signed on 18 June 2011 and the subsequent Board of Directors meeting of 20 June 2011. I have had regard to the context reflected in the contract, its provisions as a whole and the circumstances attendant upon its coming into existence. Having scrutinized the language used and all other factors I am of the view that the process was objective and leads to a sensible and reasonable result.[3]

[29] In the circumstances, I have decided to concentrate only on the aspects discussed in the judgment with the exclusion of all other issues raised by the parties. The gist of this matter hinges on the interpretation of the suspensive conditions as contained in Clause 14 of the SOBA signed on 5 July 2011 and the subsequent minutes of the Board of Directors meeting held on 6 July 2011.

[30] Consequently, the following order is made:

30.1 The suspensive conditions contained in Clause 14 of the Sale of Business Amendment Agreement signed on 5 July 2011 were not fulfilled.

30.2 The defendants are jointly and severally ordered to pay the costs of the trial relating to the separated issues, inclusive of the costs of two counsel.

TJ RAULINGA

JUDGE OF THE GAUTENG HIGH

COURT DIVISION

Heard on: 29 October - 1 November 2018

Delivered:

... January 2020

APPEARANCES

For the Plaintiffs: Adv. NGO Maritz SC; Adv. WS Jungbluth

Instructed by:

Bert Smith Incorporated

For the Defendants: Adv. JJ Brett SC; Adv. D Mahon

Instructed by:

Faber Goertz Ellis Austen Incorporated

[1] President of the Republic of South Africa and others v South African Rugby Football Association and Others 2000 (1) SA 1 (CC) at para (61) - [63]

[2] Act 71 of 2008

[3] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (A).

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